(1)

91-1290

No. _____

Supreme Court, U.S.
FILED
FEB 3 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HENRY SCHWARZER,

Petitioner,

v.

DOUGLAS COUNTY, NEVADA, a political subdivision of the State of Nevada,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA AND TO THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF DOUGLAS

PETITION FOR WRIT OF CERTIORARI

GEORGE W. ABBOTT
George W. Abbott, Chartered
1095 Airport Road
P.O. Box 98
Minden, Nevada 89423
(702)782-2300; 782-2302

Attorney for Petitioner

QUESTIONS PRESENTED

1. Did the Ninth Judicial District (state trial) Court have jurisdiction — as the trial court found, and the Nevada Supreme Court agreed — to enter a monetary judgment against defendant below Schwarzer and in favor of a private individual not a party to the trial court proceedings?

2. Did the fact that the trial judge, on his own motion, disqualified himself upon the "ground of actual or implied bias," after judgment and in the circumstances then prevailing, so taint the trial court proceedings as to require setting them aside in their entirety?

TABLE OF CONTENTS

Page

I. ORDERS AND OPINIONS OF THE COURTS BELOW..... 2

II. OPERATION OF THE ORDERS AND OPINIONS ENTERED BELOW..... 3

III. JURISDICTION..... 9

IV. INTRODUCTORY COMMENT..... 9

V. CONSTITUTIONAL PROVISIONS, COURT RULES, STATUTORY PROVISIONS..... 16

VI. STATEMENT OF THE CASE..... 19

A. Petitioner's summary position: Tomerlin "award". 20

B. Petitioner's summary position: trial judge's "voluntary" disqualification for admitted bias..... 21

C. Material (undisputed) facts: the Tomerlin "award"..... 22

D. Material (undisputed) facts: "voluntary" post-trial admission of trial court "actual or implied bias"..... 25

E. Raising of the federal questions: trial court..... 26

F. Raising of federal questions Nevada Supreme Court..... 28

VII. ARGUMENT: REASONS FOR GRANTING THE WRIT..... 29

A. Background..... 31

B. The Order to pay Tomerlin before Hookup..... 41

C. The trial court judge's "voluntary" post-trial disqualification..... 46

VIII. CONCLUSION..... 51

TABLE OF AUTHORITIES

Page

30 Am. Jur., Judgments, section 35;

46 Am Jur 2d Judgments § 86, page 373..... 43

49 C.J.S., Judgments, § 28

Cases

Adams v. School Board, 53 FRD 267... 44

Aetna Life Ins. Co. v. Lavoie, 106 S.Ct 1580, 89 L.Ed. 2d 823..... 47

Commonwealth Coatings v. Continental Casualty Co., 393 US 145, 21 L.Ed. 2d 301, 89 S.Ct. 337 (1969)..... 51

Duchesne v. Williams, 821 F.2d 1234 (6th Circ., 1987)..... 47

Frevert v. Swift, 19 Nev. 11 P. 273 (1886)..... 46, 47

Gamble v. First Jud.Dist Ct., 27 Nev.233, 74 P.530,531 (1903)..... 47

Hoff v. Eighth Jud.Dist.Ct., 79 Nev. 108, 378 P.2d 977, 978-979 (1963)..... 47

Ham v. Eighth Judicial District, 96 Nev. 409, 566 P.2d 420,424..... 47

Marshall v. Jerrico, Inc., 446 US 238, 64 L.Ed. 2d 182, 100 S.Ct. 1610 (1980)..... 50

McDonnell v. Southern Pacific Company, 281 P.2d 792, 793..... 44

Re Murchison, 349 US 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955)..... 51

Schrader v. Third Judicial District Court, 58 Nev. 188, 73 P.2d 493,497 (1937)..... 46

Federal Statutes

28 USCS § 2357(a)..... 9

State Statutes

The Nevada Revised Statutes (NRS Ann., Michie,1991). § 1.230..... 6, 18

Federal Rules

United States Supreme Court Rule 10(b) and (c)..... 30, 31

Federal Rules of Civil Procedure Rule 10(a)..... 44

State Rules

Nevada Rules of Civil Procedure (NRCP) Rule 1. NRCP Rule 10..... 44

NRCP Rule 52 and Rule 59..... 40

District Court Rules of the State of Nevada (DCR)(Michie, 1991)

DCR Rule 5..... 18

DCR Rule 13..... 18

Constitutional Provisions

United States Constitution, Fifth Amendment..... 16

United States Constitution, Fourteenth Amendment § 1..... 16

Nevada Constitution, Art. 1, § 81... 16, 45

Douglas County Ordinance

Ordinance No. 491..... 39, 40

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

HENRY SCHWARZER,
Petitioner,
v.
DOUGLAS COUNTY, NEVADA, a political subdivision of the State of Nevada,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner Henry Schwarzer respectfully prays that a writ of certiorari issue to review: the judgment and orders of the Ninth Judicial District Court of the State of Nevada in and for the County of Douglas entered in this matter on February 20, 1990 and June 13, 1990; and to review the opinions and orders of the Supreme Court of the State of Nevada entered on June 27, 1991 and on November 5, 1991 on appeal of the same matter.

I. ORDERS AND OPINIONS OF THE COURTS BELOW

None of the hereinafter referenced opinions and orders, so far as known to petitioner on the date of this petition, are reported in official or unofficial sources. Each is included in the Appendix in calendar-occurring order, with one exception, as set out below. The orders and opinions referred to are these:

Original trial court Order of February 20, 1990. (App. 1-11).

Trial court Order denying motion to amend or for new trial. (App.47- 59)

Nevada Supreme Court Order Dismissing Appeal, June 27, 1991. (App. 12-15).

Trial Judge self-disqualification Order of October 19, 1990. (App. 16-17).

Schwarzer petition for rehearing of July 16, 1991. (App. 18-19).

Trial court Order granting stay of enforcement of state court judgment to permit application to the United States

Supreme Court for a Writ of Certiorari.

II. OPERATION OF THE ORDERS AND OPINIONS ENTERED BELOW

On February 20, 1990 the Ninth Judicial District Court of the State of Nevada in and for the County of Douglas (herein sometimes "state trial court") entered a judgment in the form of an "Order" in favor of plaintiff Douglas County and against defendants Henry Schwarzer and Esther Schwarzer (herein "Schwarzer"). The February 20 order found the Schwarzer (industrial-commercial) Building not in compliance with building and fire code ordinances in effect in 19<u>77</u>, under threat of Schwarzer Building closure, ordered Schwarzer compliance. App.1-7. [Note: because of 1989 amendments to those codes, Schwarzer claimed—and the County did not seriously or effectively deny—that Schwarzer <u>was</u> in compliance in January and February of 19<u>90</u> when show cause hearings

were held.] App. 1-11.

On June 13, 1990 the state trial court ordered denial of Schwarzer's motions to amend the February 20 order, or for a new trial and denied Schwarzer's motion for oral argument on those motions. App. 47-59. Schwarzer appealed from the February 20 and June 13 trial court orders.

[Meantime: prior to commencement of the formal hearings on February 6 through 7, 1990, involving Douglas County charges against Schwarzer claiming non-compliance with county building and fire code ordinances, Schwarzer had caused to be issued a subpoena duces tecum commanding the county's chief legal officer and complainant in the trial court, the district attorney, to appear on the first day of trial and to bring with him, effectively "all records, correspondence, and papers in possession of the County relating to the Schwarzer

Building." Although his office was "about 100 feet from the courtroom" the district attorney (Kolvet) did not appear nor were all of the requested County records ever produced before the February 20 trial court rulings. (Schwarzer argued in a motion for new trial that records discovered fortuitously after the February 20 order effectively and objectively completely "cleared" Schwarzer of the "non-compliance" charges, demonstrated conclusively that in 1990 (and indeed as early as 1983 it was chargeably known to the County, on their own internal records) that the Schwarzer Building was in full compliance. Schwarzer counsel in the first week of February when the district attorney was a "no-show" requested the trial judge to proceed with contempt charges against the district attorney. The trial judge deferred consideration during the hearings in chief, several times "postponing" contempt hearings. He

did not act on them by the time of the issuance of the February 20 order, nor had he acted when he denied on June 13, 1990 Schwarzer's new trial (partly on new evidence, the "found" exonerating records) motions.]

On October 19, 1990, eight months after the February 20 decision against Schwarzer and while Schwarzer's appeal was on its way to the Nevada Supreme Court, District (trial) Judge David Gamble, on his own motion one judicial day before a Gamble-scheduled October 22 hearing on the long-delayed Kolvet contempt matter, entered his own order disqualifying himself from "all further proceedings" in the Douglas County/ Schwarzer matter. His assigned grounds, under Nevada Revised Statute § 1.230(3): "actual or implied bias." App. 16-17.

Following the 3-2 denial of petition for rehearing, the Nevada Supreme Court file, with the accompanying record on

appeal, was returned to the trial court below at some time on November 12 by Clerk's remittitur to the trial court below. Schwarzer unsuccessfully attempted a remittitur recall to permit a stay of execution pending perfection of filing of this petition for certiorari. The state's highest appellate court declined the request for remittitur recall.[1]

Defendant-appellant Schwarzer on January 9, 1992 filed in the Ninth

---

[1] Nevada Rules of Appellate Procedure, in Rule 41(a) provide that "...remittitur shall issue seven (7) days after entry of the order denying the petition (for rehearing)." On November 12, thus on but not after the seventh day from filing of the November 5 Order Denying Rehearing this action occurred: unaccountably, the Nevada Supreme Court Clerk effected remittitur on November 12, and the Court — on Schwarzer motion to recall remittitur filed on November 15 — did on November 25 — enter an order denying, without explanation, the Schwarzer motion for recall. Accordingly, the instant petition for writ is directed to the Nevada Supreme (appellate) Court and to the Ninth Judicial District (trial) court.

Judicial District Court a Motion to Stay Enforcement of Judgment Pending Application to the Supreme Court of the United States for Writ of Certiorari. App 23-41.

The Ninth Judicial District Court on January 27, 1992 signed and caused to be filed its Order Granting Stay of Enforcement of State Court Judgment to Permit Application for a Writ of Certiorari. App 42-46.

[Note: Counsel for petitioner, on the somewhat unusual course of proceedings below and in the interest of understanding of the more than 23-year whole history of Schwarzer-Douglas County administrative-legal relationships, does include, following under section heading IV, recitals supplementary to the materials mandated for certiorari petition inclusion by Supreme Court Rule 14.]

III. JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC § 1257(a) upon timely docketing of this petition.

IV. INTRODUCTORY COMMENT

Petitioner appears here claiming infringement of rights secured to him by the Federal and Nevada Constitutions.

Plaintiff below Douglas County, and defendants below Henry and Esther Schwarzer (as detailed more fully infra) did, through some 13 years of county-citizen dealings through administrative agencies and thereafter nearly ten years of formal court proceedings, have dealings involving a small industrial-commercial building constructed by Schwarzer. Until December of 1983 (five years after the building was in place and occupied) these two parties attempted to resolve differences arising over compliance or non-

compliance by Schwarzer with state and county building and fire code requirements. Following issuance by the County between 1967 and 1977 of successive multi-phase building permits, Schwarzer completed construction of the office-workspace-warehouse Schwarzer Building on what is known as Airport Road in Douglas County. It is not disputed that the building has been tenanted in whole or in part since 1978. The County, beginning in December of 1983 initiated injunctive action in the Douglas County trial court which led to a decision by that court in February of 1990 which triggered a Schwarzer appeal to the Nevada Supreme Court, ultimately producing this petition to this Court.

The January 27, 1992 Order Granting Stay (App. 42-46, entered by Judge Gamble's successor) does, inter alia, recognize (as indeed did Judge Gamble) that Schwarzer had already paid plaintiff

County a $2,000 *ordinance-required* "hook up" fee for connection to a pipeline source on County road property in front of the Schwarzer Building 1.06 acre tract, a pipeline constructed (in part with a $400,000 federal assistance grant to a private third party consortium controlling +/- 1,000 "down pipeline" acres) for private development of a nearby 116+ acre "Tomerlin entity" industrial use tract.[2]

---

2 The Las Vegas MGM Grand Hotel fire which occurred on November 21, 1980 resulted in 84 deaths and triggered a reexamination and revision of local and state fire codes throughout the state of Nevada. The new laws required "retrofitting" of many, many existing buildings, but it is not disputed that the Nevada State Fire Marshal's office inspected the Schwarzer Building and on March 16, 1982 certified it as "in compliance with the (post-MGM) fire retrofit requirements" (of the 1981 amendments of the Nevada State Legislature to the controlling statutes [Nevada Revised Statutes §§ 477.100 - 477. 170 (ROA Exhibits T, U), the State Fire Marshal did in 1983 find the Schwarzer Building in compliance. That compliance included existence, determined by the state inspection that found four-hour eight-inch firewalls enclosing each of the three (less than 5,000 square feet) workspace units in the building. These

The February 20 order also directed (as "equity requires") Schwarzer to make a

---

findings, minimally demonstrated that Schwarzer, following the 1989 amendments to the Douglas County fire code was in full compliance, arguably on the County's own records, had been since at least 1983. It was on December 7 of 1983 that Douglas County first filed suit against Schwarzer charging he was not in compliance with Douglas County ordinances as interpreted by the district attorney's office. It is not disputed that at County insistence Schwarzer had expended in 1986 and 1987 some $40,000 installing a fire code sprinkler system in his building to "hook up readiness," or that he had his own well on his own property to make that sprinkler system operative if no other two-inch pressure pipe source was available. Whatever the water source, the requirement to make the Schwarzer sprinkler system operative was a four-inch non-consumptive main pressure source stepped-down to two inches for connection to the sprinkler system. The adjacent 116-acre " Tomerlin" parcel ,alone, envisaged water demands for as much as 400,000 square feet of commercial-industrial building space, as compared with Schwarzer's +/- 12,800 square feet. The "Tomerlin" 116-acre parcel is part of a 1,000-acre+ Tomerlin et al multi-party consortium site (located "down-pipeline" from the Schwarzer 1.06 acre tract) to be serviced by a 10-inch constant-flow consumptive-use pipeline constructed in 1988-89 and placed in a Douglas County-state roadway passing in front of the Schwarzer property.

monetary payment of $8,113.07 to one William Tomerlin (Tomerlin) a non-party to the trial court action, as Schwarzer's "one-half share" of funds claimed to have been expended for pipeline extension in front of the Schwarzer property. App. 6,

The Nevada Supreme Court on June 27, 1991 in its Order Dismissing Appeal (App. 8-10) declared: "We also believe the court correctly determined that 'appellant was equitably required to reimburse his neighbor for one-half the cost of extending the water main...'").

When Schwarzer timely filed a petition for rehearing on July 15, 1991, he assigned these grounds for reconsideration (App. 18-19):

* * * * *

1. This court should reconsider its conclusion that the district court had jurisdiction to order Schwarzer "to pay William Tomerlin $8,113.07" (or any other amount) because "equitably required" to do so.

2. This court was in error in its

failure sua sponte to vacate and set aside the district court's challenged order and to remand with directions for a new trial where, as here, the trial judge — on his own motion after judgment and after this appeal had been lodged — disqualified himself pursuant to the provisions of NRS § 1.230 (3) "upon the ground of actual or implied bias" while this appeal was pending.

3. In January and February of 1990 (as is the case today) the Schwarzer Building was in compliance with the applicable Douglas County fire and building code ordinance governing sprinklering.

* * * * *

On November 5, 1991, a divided Nevada Supreme Court entered its Order Denying Rehearing. App. 11-13. The three-judge majority entered its denial order without comment or explanation. The two-judge minority filed a written dissent, including these declarations (Justice Steffen, joined by Justice Springer):

* * * * *

In our rush to do equity, this court (in the Order Dismissing Appeal) this court overlooked fundamental, black letter law: a court is without jurisdiction to enter a

> judgment either for or against a non-party to an action. (citations omitted).
>
> * * *
>
> I am unaware of any lawful principle that would support the district court's judgment ordering Schwarzer to pay his neighbor, William Tomerlin, a non-party to the action, the sum of $8,113 (one-half the cost of the water main extension.) We were simply wrong in affirming a judgment that by all means is void insofar as it grants relief to a non-party....

Defendant-appellant Schwarzer then filed in the Ninth Judicial District Court a Motion to Stay Enforcement of Judgment Pending Application to the Supreme Court of the United States for Writ of Certiorari. App. 23-41.

The Ninth Judicial District Court on January 27, 1992 signed and caused to be filed its Order Granting Stay of Enforcement of State Court Judgment to Permit Application for a Writ of Certiorari. App. 42--46.

None of the referenced opinions and orders, so far as known, are reported in

official or unofficial sources.

V. CONSTITUTIONAL PROVISIONS, COURT RULES, STATUTORY PROVISIONS

The clauses and provisions of the Nevada and United States Constitutions are cited below and set forth in pertinent part verbatim.

> Nevada Constitution, Art. 1, § 8, last sentence:
>
> "No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use withoutjust compensation having first been made...".
>
> * * *
>
> United States Constitution, Fifth Amendment:
>
> "No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."
>
> * * *
>
> United States Constitution, Fourteenth Amendment § 1:
>
> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Nevada Rules of Civil Procedure (NRCP) (Michie, 1991) "...govern the procedure in the district courts in all suits of a civil nature whether cognizable as cases in law or in equity." NRCP Rule 1. NRCP Rule 10 governing the form of pleadings in all district courts (emphasis added) provides that:

* * *

"Rule 10. Form of Pleadings.
(a) Caption; names of parties. Every pleading shall contain a caption setting forth the name of the court and county, the title of the action, the file number, and a designation under Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleading it is sufficient to state the name of the first party on each side with an appropriate indication of the other parties...".

* * *

District Court Rules of the State of Nevada (DCR)(Michie, 1991) "...cover the practice and procedure in all actions in the district courts of all the districts where no local rule covering the same subject has been approved by the supreme court."

DCR Rule 5.

DCR Rule 13 governing procedure for making motions,etc., provides:

* * *

"2. A party filing a motion shall also serve and file with it a memorandum of points and authorities in support of each ground thereof. The absence of such memorandum may be construed as an admission that the motion is not meritorious and cause for its denial or as a waiver of all grounds not so supported.

3. Within 10 days after the service of the motion, the opposing party shall serve and file his written opposition thereto, together with a memorandum of points and authorities and supporting affidavits, if any, stating facts showing why the motion should be denied. Failure of the opposing party to serve and file his written opposition may be construed as an admission that the motion is meritorious and a consent to granting the same."

* * *

The Nevada Revised Statutes (NRS Ann., Michie,1991) contain these provisions.

§ 1.230. Grounds for disqualifying judges other than supreme court justices.

1. A judge shall not act as such in an action when he entertains actual bias or prejudice for or

against one of the parties to the action.

* * *

3. A judge, upon his own motion, may disqualify himself from acting in any matter upon the ground of actual or implied bias.

VI. STATEMENT OF THE CASE

The two associated but dissimilarly rooted questions presented (page "i", supra)—the Tomerlin "award", and the trial judge's post-judgment "voluntary disqualification"—will be treated separately by appellant. Paragraphs here and in the Argument following are Arabically numbered for ease of cross-reference. ["ROA" refers to page numbers in the clerk's record on appeal from the trial court to the Nevada Supreme Court. Defendant-respondent Douglas County has its own ROA indices, can therefore confirm the undisputed allegations, facts set out. "App.___" refers to the Appendix and the page(s) therein, this petition.]

A. Petitioner's summary position: Tomerlin "award"

1. The state district (trial) court's order of February 20, 1990 included these "findings" [App. 1-11]:

* * * * *

> "12. The SCHWARZERS have paid a $2,000 hook up fee to the COUNTY.
>
> 13. Equity requires that William Tomerlin be reimbursed $8,113.07, which is one-half (1/2) of the costs of installing the water main in front of the SCHWARZER property...".

* * * * *

2. The state district (trial) court's Order of February 20, 1990 carried this mandate [App. 1-11]:

* * * * *

> "3. The SCHWARZERS are to pay Tomerlin $8,113.07 for one-half (1/2) the cost of the installation of the water main. Payment is due prior to the hook up.

* * * * *

3. Schwarzer position: the trial court was wholly without authority, in law or in fact, to order defendant Schwarzer

to pay any sum whatsoever in these proceedings to William Tomerlin—a private citizen, not a party to these proceedings, not named, not interpleaded, not even appearing as a party, not claiming personal monetary outlay of any amount for the benefit of Mr. Schwarzer.

B. Petitioner's summary position; trial judge's "voluntary" disqualification for admitted bias

4. Trial Judge David Gamble, on his own motion entered an Order on Friday October 19, 1990 [App 16-17]. He did so less than one judicial day before a scheduled contempt show cause hearing (3:00 p.m. on Monday, October 22) involving the Douglas County District Attorney who, with his deputies, had vigorously prosecuted the Schwarzer case for nearly eight years.[3]

---

3 Schwarzer in a Nev. R.Civ.P. Rule 59 (New trials; amendment of judgments) motion filed on March 4,1990 [ROA 259-275] had

C. Material (undisputed) facts : the Tomerlin "award"

5. The only NRCP Rule 10 parties in state trial court proceedings spanning more than a decade (1983-1992) were these: plaintiff Douglas County, defendant(s) Schwarzer(s).

6. William R. Tomerlin (Tomerlin) was not at any time a plaintiff or

---

alleged under the appropriate Rule 59(a) subdivisions inter alia: irregularity in the proceedings of the court and adverse party Douglas County, misconduct of the prevailing party, surprise which Schwarzer could not have guarded against, and newly discovered evidence not discovered during trial after reasonable Schwarzer diligence. The "misconduct" centered around the district attorney's failure to appear at the Schwarzer hearings (and to bring all relevant County records relating to the Schwarzer Building). County records accidentally found after trial and judgment entry would have, in fact, confirmed that as of the February 20, 1990 judgment the Schwarzer Building was in compliance with all state and county fire codes. The show cause hearing set for the first judicial day after Judge Gamble withdrew for admitted bias, would have required the District Attorney to face contempt charges for disobedience of the trial subpoena.

defendant.

7. The only parties appearing of record at any time in appellate proceedings were these: defendant-appellant Schwarzer; plaintiff-appellee Douglas County.

8. Tomerlin was not at any time a party appellant or party appellee.

9. The only parties, individuals or entities, appearing of record in these certiorari proceedings are these: petitioner Schwarzer; respondent Douglas County. The Tomerlin name nowhere appears in the titling of the case.

10. Petitioner Schwarzer in his Motion to Stay Enforcement of Judgment (Pending Application for Writ of Certiorari) filed on January 9, 1992 [App. 23-41] Schwarzer sets out the grounds upon which he will rely on certiorari [App. 29-33, n.b. footnote 3, App. 29-30 and f.n. 4, App. 33-34]: a trial court (Ninth Judicial District Court) order

awarding a money judgment to one William Tomerlin, a person not a party to these proceedings; and the effect on the trial court proceedings had of the trial judge's "voluntary" withdrawal, citing Nevada's "actual or implied" bias statute.

11. The Ninth Judicial District Court's Order Granting Stay, made effective at 8:30 a.m. on January 27, 1992 carries these two recitals (emphasis added):

* * * * *

> 2. Plaintiff Douglas County did not within 10 days after service and at the date of this order 15 days thereafter still has not filed any written opposition.
>
> 3. Failure of Douglas County to serve and file its written opposition, pursuant to Nevada District Court Rule 13 (3), constitutes admission that the motion is meritorious and a consent by Douglas County to granting of the same.

12. This court-found "admission (by Douglas County) that the motion is meritorious" together with the court-found

"consent by Douglas County to granting of the same" has significance, perhaps, on the whole Douglas County-Schwarzer history: after more than eight years of County vs. Schwarzer proceedings in the Ninth Judicial District Court, these factors should, arguably and alone, be held to be grounds for granting of petitioner Schwarzers requested writ of certiorari to the Ninth Judicial District Court and Nevada's Supreme Court. And see Argument for Allowance of Writ, infra.

D. Material (undisputed) facts; "voluntary" post-trial admission of trial court "actual or implied bias"

13. Reading of the trial court record and rulings, Schwarzer asserts, will demonstrate whether it is the case that at almost every turning the trial judge ruled against defendant Schwarzer and his counsel, ruled for plaintiff Douglas County and its counsel. Those specific references must await briefing by

the parties here.

14. It is not disputed that on October 19, 1990 District Judge David Gamble ordered his own disqualification, effectively for admitted "actual or implied bias." NRS § 1.230, supra.

E. Raising of the federal questions: trial court

15. The February 20, 1990 trial court Order [App. 1-11] directing Schwarzer payment to Tomerlin was the subject of Schwarzer post-order Nevada Rules of Civil Procedure Rule 52 and Rule 59 motions in the alternative: to amend findings, conclusions and judgment; or for new trial. ROA 276-290. That federal question aspects were addressed is evidenced by these extracts:

* * * * *

> (ROA 277, lines 10-14): ...with Constitutional guarantees in mind the Court should enter its order affording defendants a jury trial on the William Tomerlin (Meridian Industrial Park) claim, or the Court should enter its order declining to

assume an advocate's role for a private citizen."

* * * * *

(ROA 278, lines 15-16, 21-26 : Defendants submit points and authorities directed to and in support of ...

* * *

(c) in view of the position of the county prosecutors, acquiesced in and supported by other county officials, tacitly adopted by the Court, the defendants are entitled to a jury trial in a separate or bifurcated proceeding if the Court does not set aside its finding of any Schwarzer dollar obligation <u>in these proceedings</u> to the William P.(sic) Tomerlin interests

* * * * *

(ROA 282, lines 4-14) : 11 . The whole record as made up to sundown on February 20, 1990 compels a conclusion that genuine and serious Fifth and Fourteenth Amendment due process questions are raised, in that the Court has ordered payment over to the William Tomerlin interests (private citizens all) by private citizen Schwarzer(s) interests. The Court, effectively, concluded that Mr. Tomerlin has a right to decide ...what he is going to charge Mr. Schwarzer to hook up." This, we suggest, the Court — even in Douglas County — cannot do. This, Schwarzer counsel suggests, is a judicially sanctioned ticket to taking of property without due

process...

F. Raising of federal questions: Nevada Supreme Court

16. In his Opening Brief on Appeal (copy in the hands of Douglas County for reference) filed in the Supreme Court on December 15, 1990, Schwarzer included (p.5, line 20 through line 9, page 6) these statements of the issues:

* * * * *

> 14. Whether the trial court erred in finding that Schwarzer must pay to William Tomerlin --a person with whom he had no privity -- the sum of $8,113.7 as "one-half (1/2) of the costs of installing the water main in front of the Schwarzer property," or any amount whatsoever ...And, whether the trial court exceeded its authority with respect to this conclusion on the record:
>
> "Mr. Tomerlin, I assume, decides what he's going to charge Mr. Schwarzer to hook up ?" (Vol. 4, Transcript 2/7/90, p. 43, lines 1-2).
>
> 15. Whether a Nevada district court had authority to enter an order (ROA 245, lines 18-20) directing payment — as a condition of hook-up, or otherwise— by Schwarzer to a non-privity stranger, Tomerlin, of the sum of $8,113.07,

without formal jury trial proceedings, and without running counter to Nevada Constitution and Federal Constitution due process and just compensation provisions.

* * * * *

17. In addition to the foregoing the Schwarzer federal questions position before the Nevada Supreme Court is reflected in extracts from the Petition for Rehearing filed in that Court on July 15, 1991 as reproduced in pertinent part in the Appendix annexed to this petition. App. 18-19. And see Argument following.

VII. ARGUMENT: REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

18. This is a case where petitioner, literally, has no place left to go —except to this, the nation's court of last resort. It is a case where something got untracked in a county's dealings with its citizens, where a state trial judge perhaps unwittingly surrendered true impartiality because influenced by a

sense of commitment to fellow county officials, and where the state's heavily burdened highest appellate court [in the words of the two-man minority in their dissent (App.20, at 21) to the three judge majority's Order Denying Rehearing, declared that:

> " In our rush to do equity, this court overlooked fundamental, black letter law: a court is without jurisdiction to enter judgment either for or against a non-party to an action. (Citations omitted)."

This a case, petitioner believes, that falls squarely within the standards for review set out in Supreme Court Rule 10.1 (b) and, arguably, Rule 10.1 (c).

19. The Nevada Supreme Court is a state court of last resort which—in the language of United States Supreme Court Rule 10.1 (b)—"...has decided a federal question in a way which conflicts with the

decision of another state court of last resort (and, indeed, conflicts with the Nevada Supreme Court's own decisions)."

20. The Nevada Supreme Court, and the Ninth Judicial District (trial) Court of the State of Nevada are state courts which—in the language of United States Supreme Court Rule 10.1 (c)—"...have decided ...question(s) in a way in conflict with applicable decisions of this Court."

21. As a predicate to outlining of the petitioner's assigned reasons for granting the requested writ, a summary of the background of the Douglas County-Henry Schwarzer 23-year relationship, set out in one place here, may be helpful.

A. Background

22. Henry Schwarzer, a 71-year old native of Switzerland and naturalized United States citizen, is a master craftsman in the field of precision metal machining. His production out of the

Schwarzer Building in Douglas County, Nevada (with his wife Esther and their employees) from plain raw blocks of metal (often machined within one-millionth of an inch specified tolerance) can be found in NASA-launched satellites orbiting space, in classified military and intelligence agency weaponry and surveillance devices not even identified for Schwarzer, in U.S. Navy surface and undersea craft, in U.S. Army and Marine Corps radar-sonar devices, in many private sectors embracing numerous commercial and general aviation devices (including "every Boeing aircraft in existence today.")

23. There is a parcel of land, 1.06 acres in size designated on official records of the Douglas County, Nevada Assessor's office as parcel Number 23-040-07. It is located on Airport Road approximately four miles north and one mile east of the county-seat town of Minden.

24. More than 23 years ago, on September 20, 1967 Schwarzer applied to Douglas County for the first of four building permits issued by the County on that date and in 1977, 1978, and 1979 for the multi-phase (unit by adjacent unit, common firewall) of an industrial use building on the Schwarzer Airport Road property.

25. Successive building plans called for by the County, submitted to the County, and approved each in turn by the County were processed, as phased construction progressed, in 1967, 1977, 1978 and 1979. The Schwarzer Building has been continuously occupied in whole or in part, as phased construction permitted, since 1979. It was occupied when the lower court proceedings were had in the Douglas County trial court. It was occupied when the Nevada appellate court proceedings were had. It is occupied today.

26. The County subsequently demanded administratively in 1979, by legal action initiated in 1983 and continued up to the date of these certiorari-petitioning proceedings, that the building be closed until the County-version of "compliance" was demonstrated by Mr. Schwarzer. A Douglas County December 7, 1983 complaint against Schwarzer demanded that the building be closed from all future occupancy until Schwarzer "compliance", that meantime an Occupancy Permit be withheld, and that the Court consider "such other relief as the Court deems just." [As "other relief" the County's district attorney and successive chief deputies demanded "jail time" for Henry Schwarzer, forfeiture of the sum of $7,000 (plus interest) held by the County as an outgrowth of the 1983 complaint.

27. A dramatic and tragic fire at the Las Vegas MGM Grand Hotel on November 21, 1980 stimulated reexamination and

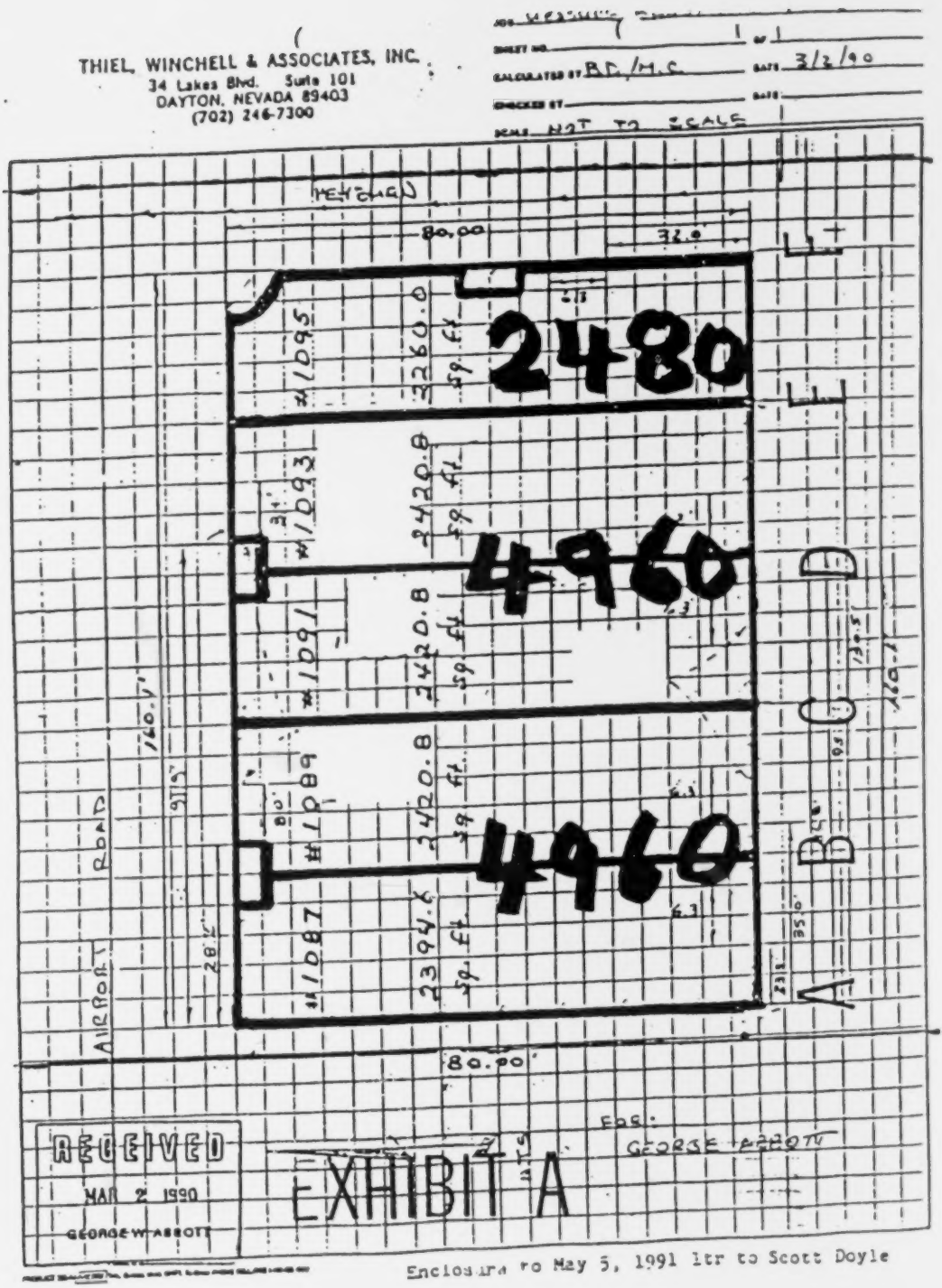
revision by state and local governments of building and fire code ordinances in 1981. The Nevada State Fire Marshal, on March 16 of 1982, certified the Schwarzer Building as "in full compliance" with state code requirements. ["ROA" references which follow are to the record on appeal by Schwarzer to the Nevada Supreme Court, full copies of which are in the hands of respondent Douglas County.]

28. On December 7, 1983 (ROA 1-18) the County initiated legal proceedings against Schwarzer seeking mandatory injunctive relief (ROA 4) "to permanently enjoin the occupancy of the building," or, alternatively, "to order that Defendant comply with the mandate of the laws set forth in this complaint."

29. The December 7, 1983 complaint against Schwarzer was filed by then Douglas County district attorney Brent Kolvet (named only because he figures throughout the 1983-1990 injunctive and

contempt actions against Schwarzer, just as he figured in the "voluntary" disqualification on October 19, 1990 of state District Judge David Gamble. Judge Gamble's self-generated admission of "actual or implied bias" [App. 16-17] came only one judicial day before District Attorney Kolvet was scheduled to appear before Judge Gamble in the Ninth Judicial District Court on a Schwarzer contempt of court motion for Kolvet's failure and refusal to appear on the first day of the Schwarzer trial in February of 1990 trial, and failure therefore to bring to the Court "all county records bearing on the Schwarzer Building".] It was only after Judge Gamble's February 20, 1990 ruling that Schwarzer was not in compliance (e.g. Judge Gamble's found and concluded [App. 4] effectively that: "the Schwarzer building area exceeds 13,000 square feet in area, therefore requires sprinkler-ing." It was a week after the February 20

Judge Gamble "non-compliance" conclusion that it was fortuitously discovered by Schwarzer counsel that County official records (never produced during trial by the district attorney or other subpoenaed county officials) since 1983 had, in fact shown conclusively by the County's own measurements, that the building area was less than 13,000 square feet (12,536) and therefore, firewalls considered, was actually in compliance with the Douglas County building and fire codes. The trial judge steadfastly insists in his anchor FOF 1 (App. page 4) that "the building contains over 13,000 square feet. [The trial judge just as steadfastly refused even to consider the wholly objective evidence negativing that key finding reflected in documents such as the one set out following.



Enclosure to May 5, 1991 ltr to Scott Doyle

BEST AVAILABLE COPY

[The Exhibit A certified survey, confirmed by the County's own records and papers shows: a 12,400 square foot, three-main unit (AC, 1087 and 1089 Airport Road; CE, 1091 and 1093 Airport Road; EF, 1095 Airport Road) with unbroken 8-inch, 4-hour firewalls (walls A,C,E, and F) and interior subunits (AB,BC for 1087 and 1089 Airport Road; and CD, DE for 1091 and 1093 Airport Road, also divided by minimum opening 8-inch, 4-hour firewalls (walls B and D). Even cursory examination of the April 6, 1989 Amended Douglas County Code's fire ordinance (App. 60) Douglas County Fire Ordinance, demonstrates full compliance with the ordinance in effect in February, 1990.[4]

---

4 January and February of 1990 as a predicate to the Schwarzer show cause hearing which ultimately led Mr. Schwarzer to One First Street Northeast, in Washington, D.C. was this (ROA Tr.,Jan.8,Feb. 6,7, Ninth Judicial District Judge David R. Gamble on February 6,1990) was this declaration (a paraphrase):

The trial judge in the court below, District (state) Judge Gamble characterized the nearly seven-year period from December 7, 1983 until issuance of the February 20, 1990 ruling in this fashion:

> "Since that time (December 7, 1983) various hearings and trials have been held and several orders mandating that the Defendant bring the building into compliance with existing codes. Unfortunately, no one ever clearly informed the Defendants (Schwarzers) of the exact requirements necessary to comply with the codes and Special Use Permit."

31. The appeal to the Nevada Supreme Court was directed to the February 20 order and an order entered on June 13, 1990 denying a Schwarzer NRCP Rule 52 and Rule 59 motion to amend, or in the alternative for a new trial. The proceedings involving Judge Gamble's self-

---

It would seem foolish for this Court to impose 1977 fire code requirements by a court order in 1990 if Mr. Schwarzer is in compliance with the existing Code. The trial then proceeded, with strong Douglas County urging, to do just that.

"disqualification" and the proceedings had before the Nevada Supreme Court are discussed supra and are reproduced in the Petitioner's Appendix accompanying this petition. Petitioner turns now to the offending trial and appellate court orders and rulings.

B. The Order to pay Tomerlin before Hookup

32. The district court's Order of February 20, 1990 included these findings (App. pps 6-7):

> 11. The SCHWARZERS are to pay for the actual hook up to the existing water system and the back flow prevention device.
>
> 12. The SCHWARZERS have paid a $2,000 hook up fee to the COUNTY.
>
> 13. Equity requires that William Tomerlin be reimbursed $8,113.07, which is one-half (1/2) of the costs of installing the water main in front of the SCHWARZER property....

33. The district court's Order of February 20, 1990 also included this mandate (App. p 11).

3. The SCHWARZERs are to pay

> Tomerlin $8,113.07 for one-half (1/2) the cost of the installation of the water main. Payment is due prior to the hook up.

34. Appellant suggests that this district court order: was made without jurisdiction to do so; was made even though Schwarzer had already made payment of $2,000 for hook up and was thus in compliance with Douglas County ordinances; the procedure followed in reaching the finding that Schwarzer should pay Tomerlin, and the amount found by the trial court to be due combine to violate the Nevada Rules of Civil Procedure, the Nevada State Constitution, and the Constitution of the United States.

35. Schwarzer contends that the Douglas County district court was without authority to render a judgment in favor of William Tomerlin (Tomerlin) a person who was not a party to the district court action.

36. The general rule as set out at

46 Am Jur 2d Judgments § 86, page 373 (emphasis added, case citations omitted) is: "that a judgment may not be rendered in favor of or against a person who was not made a party to the action and who did not intervene and file a claim (cases cited). Neither is a person made a party to a proceeding simply by including his name in the judgment (cases cited)."

37. Petitioner's search has not disclosed a single federal or state court decision which supports the antithetical proposition. The cases collected in the American Jurisprudence and Corpus Juris Secundum annotations appear to span to full spectrum of state and federal courts in support of the quoted general rule, as applied to all parties, plaintiff or defendant. The dissent of two of the Nevada Supreme Court's five justices describes the applicable rule as "black letter law". App. 20-22. The applicable federal and state procedural rules

effectively reinforce the announced general rule.

38. Here, Tomerlin was "awarded" a judgment against Schwarzer. Tomerlin was not a party to the trial court proceedings. Rules of court procedure supply controlling guidelines. The Nevada Rules of Civil Procedure (NRCP) became effective on July 1, 1953. The first two sentences of NRCP Rule 10(a) governing "Caption" and "names of parties" are identical to the Federal Rules of Civil Procedure Rule 10(a). That rule in pertinent part of the second sentence (NRCP and FRCP) reads:

> Rule 10(a)...In the complaint the title of the action shall include the names of all the parties

And see, of many federal rulings Adams v. School Board, 53 FRD 267 ("Rule 10 (a) requires that the caption in a complaint shall contain the names of all parties.)

Finally, the Nevada Supreme Court decision is as war with holdings such as that found in McDonnell v. Southern

Pacific Company, 281 P.2d 792, 793, where the Arizona Supreme Court declared that:

> A court has no jurisdiction to render a judgment in favor of one not a party to the suit. 30 Am. Jur., Judgments, section 35; 49 C.J.S., Judgments, § 28; ...Parties cannot be brought into court and a valid judgment rendered for or against them by merely including them in the judgment. As was well said in Dunlap v. Southerlin, supra:
>
> "Courts have no more power, until their action is called into exercise by some kind of pleading to render a judgment in favor of any person than they have to render judgment against a person until he has been brought within the jurisdiction of the court in some method recognized by law as sufficient;..."

A judgment entered without jurisdiction is, plainly, void. Any attempt to enforce such a void judgment would in turn be unlawful and in violation of the cited state and federal Constitutional due process provisions. The Ninth Judicial District Court order clearly runs afoul of the provisions of Nevada's Constitution (Art. 1, § 8) as well as the provisions of the United States Constitution (Amendment

5, Amendment 14) relating to due process, just compensation, and equal protection.

C. The trial court judge's "voluntary" post-trial disqualification

39. Both federal and state court decisions strongly militate against upholding a court decision where the presiding judge is found to have bias. The Nevada Supreme Court has held that "due process of law requires that a person have reasonable notice and a reasonable opportunity to be heard before an impartial tribunal, before any binding decree can be passed affecting h is right to liberty or property (Const. U.S. Amend 14; Const. Nev. art 1, § 8.)" Schrader v. Third Judicial District Court, 58 Nev. 188, 73 P.2d 493,497 (1937). For more than a century the case law in Nevada has held the acts of a judge involving the exercise of judicial discretion, in a case wherein he is disqualified from action are not voidable merely, but void. Frevert v.

Swift, 19 Nev. 11 P. 273 (1886). Cf. Aetna Life Ins. Co. v. Lavoie, 106 S.Ct 1580, 89 L.Ed. 2d 823. Duchesne v. Williams, 821 F.2d 1234 (6th Circ., 1987).

40. In an unrelated Nevada case Gamble v. First Jud.Dist Ct., 27 Nev.233, 74 P.530,531 (1903),cited in Hoff v. Eighth Jud.Dist.Ct., 79 Nev. 108, 378 P.2d 977, 978-979 (1963), the Nevada Supreme Court laid down these guidelines:

" The actions of a district judge disqualified by statute [when implied bias exists, under NRS 1.230] are not voidable merely, but void, has long been the rule in this state....The plain injunction of the statute leaves the disqualified judge no discretion.

He has but one thing to do, and it is his duty to do that thing (disqualify himself at once)."

And the Nevada Supreme Court ruled in 1977 on a very similar judicial sequence in Ham v. Eighth Judicial District, 96

Nev. 409, 566 P.2d 420,424 (Trial judge's action in purporting to voluntarily disqualify himself after he had ruled in certain litigated matters in the case was ineffectual* * *(and) judicial action would have been void and improvidently issued.)

41. In the circumstances of the Schwarzer case before Judge Gamble, the participants have no way of knowing at what precise moment the trial judge "discovered" that he was impliedly or actually biased.

42. [While the trial transcript is not a part of this record, it may have been when Schwarzer Attorney Abbott on he first day of trial asked: "May I be heard?" and Judge Gamble replied: "You may not. Have a seat." Or, it may have been when, on a point of law and question by Attorney Abbott, Judge Gamble responded by saying: "So, take it to the Judicial Commission!".]

43. Henry Schwarzer cannot know when the trial judge "found" that he entertained bias. Attorney Abbott cannot know. The Nevada Supreme Court did not even address the subject in either its initial Order Dismissing Appeal [App. 12-15] or in its Order Denying Rehearing [App. 20-22]. This court of last resort cannot divine when trial judge bias was born, but may assume—out of fairness to all parties and our judicial system—that the trial judge's bias was not the result of some sort of courtroom instantaneous Immaculate Conception.

44. In his case research petitioner's undersigned counsel was not able to find precedential holdings in other jurisdictions fitting the factual situation which gives rise to the instant question. This may bring the case within the reach of Rule 10(c) as a case where "a state court...has decided an important question which has not been but should be,

settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." Several decisions of this court are instructive: Marshall v. Jerrico, Inc., 446 US 238, 64 L.Ed. 2d. 182, 100 S.Ct. 1610 (1980) (Due process clause of Fifth Amendment entitles persons to impartial and disinterested tribunal in both civil and criminal cases, since requirement of neutrality and adjudicative proceedings safeguards two central concerns of procedural due process: prevention of unjustified or mistaken deprivations and promotion of participation and dialogue by affected individuals in decision making process; since neutrality requirement helps to guarantee that no person will be deprived of interests without proceeding in which he has assurance that arbiter is not predisposed to find against him, stringent rule that justice must satisfy appearance of justice must be applied,

although it may sometimes bar trial by judges who do not have actual bias.)

Cf. Re Murchison, 349 US 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955) (Fair trial, as required by due process clause of Amendment 14 requires absence of actual bias on the part of a judge.) Commonwealth Coatings v. Continental Casualty Co., 393 US 145, 21 L.Ed. 2d 301, 89 S.Ct. 337 (1968) (A tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias.)

VIII. CONCLUSION

45. For the foregoing reasons, it is requested that this Court grant the requested petition for writ of certiorari.

Respectfully submitted this 31st day of January, 1992.

HENRY SCHWARZER, Petitioner

By George W. Abbott
George W. Abbott
Attorney for Petitioner

PETITIONER'S APPENDIX

INDEX TO PETITIONER'S APPENDIX

		Page
20 Feb 90	Order (Trial Court)	1-11
27 Jun 91	Order Dismissing Appeal (NV Sup Ct)	12-15
19 Oct 90	Order (Trial Judge disqualification)	16-17
16 Jul 91	Petition for Rehearing (Schwarzer)	18-19
5 Nov 91	Order Denying Rehearing (NV Sup Ct)	20-22
9 Jan 92	Motion to Stay Enforcement of Judgment Pending application to the Supreme Court of the United States for Writ of Certiorari; and for an (ex parte) Order Shortening Time for Hearing	23-41
27 Jan 92	Order Granting Stay of Enforcement of State Court Judgment to Permit Application to the United States Supreme Court for a Writ of Certiorari	42-46
13 Jun 90	Order (denying defendants' motion to amend, or in alternative for New Trial)	47-59
6 Apr 89	Douglas County Code Ordinance No. 491	60

Case No. 14399 FILED 20 Feb 90
Dept. No. 1

IN THE NINTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR
THE COUNTY OF DOUGLAS

DOUGLAS COUNTY, NEVADA, a political subdivision of the State of Nevada,
Plaintiff,

vs.

HENRY SCHWARZER and ESTHER SCHWARZER;
Defendants.

ORDER

In December 1983 DOUGLAS COUNTY (hereafter referred to as COUNTY) filed a Complaint seeking a permanent injunction enjoining the occupancy of the SCHWARZER building located at 1095 Airport Road, Minden, Nevada, or in the alternative, an order issued to force the Defendant to comply with the law in regard to the building in question, and for attorney's fees.

Since that time various hearings and trials have been held and several orders entered mandating that the Defendants bring the building into compliance with

1

the building codes, fire codes, and the Special Use Permit issued for the Defendants' building. This case has an extremely tortured history. The Defendants could have been spared many problems had the COUNTY clearly spelled out exactly what was required to bring the building into compliance with existing codes. Unfortunately, no one ever clearly informed the Defendants of the exact requirements necessary to comply with the codes and Special Use Permit.

Then, apparently while settlement negotiations took place, the case had no pleadings filed since February 20, 1987. Since the case was inactive, on November 20, 1989, the Court ordered the parties to appear on January 2, 1990, to show cause why the case should not be dismissed.

On January 2, 1990, it was the Court's perception that the COUNTY had not been diligent in completing the case. Therefore, the Court scheduled a hearing

to determine whether the building in question was in compliance with current building and fire codes, and if so, then, the SCHWARZERs would potentially be relieved of the requirement to comply with past court orders.]

At the January 2, 1990, hearing, DOUGLAS COUNTY opposed the dismissal of the action and the Defendants sought an evidentiary hearing on the matter. Since no one could testify as to whether the building was in compliance with existing codes, evidentiary hearings were held on February 6 and 7, 1990, to determine compliance. Testimony and evidence were received at these hearings. There was testimony on whether the parapet walls were in compliance with the current codes. There were not. The testimony was that the walls were not four (4) hour fire walls as required by the codes. Therefore, even without the provisions of the special use permit, the sprinkler

system is required to be hooked up and functional.

Previously decided issues were not relitigated. The Court however, reviewed the file, the pleadings, and transcripts. This Order merely reaffirms the appropriate previously entered Court Orders.

The Court makes the following findings:

1. The building located at 1095 Airport Road, Minden, Nevada, has over 13,000 square feet and parts of this building have been occupied since 1978.

2. No Certificate of Occupancy has been issued by the Public Works Department.

3. When the original building permit was issued to the SCHWARZERs in 1967 HENRY SCHWARZER signed the permit agreeing to comply with all applicable rules, ordinances and laws.

4. When the next building permit was

issued on August 16, 1978, ESTHER SCHWARZER signed the building permit agreeing to comply with all applicable rules, ordinances and laws.

5. The building which is apparently owned by ESTHER SCHWARZER is not in compliance with: -

a) existing building and fire codes,

b) the Special Use Permit issued April 7, 1977.

6. According to the Special Use Permit the sprinkling system must be approved by the Douglas County Fire Chief and ISO (Insurance Services Office).

7. On February 3, 1983, the Board of County Commissioners refused to waive the sprinkler system requirement because of the distance from the building to the fire department; the volunteer nature of the fire department; and the size and the proposed use of the building. The Commissioners believed the sprinkler system requirement was necessary to

protect life and property in the building and surrounding areas.

8. The square footage in each unit is immaterial because the Special Use Permit requires a sprinkling system in the building that is operational and hooked up to an adequate, functional water system for occupant safety and because the presence of the system is deceptive to underwriters, insurance companies, and occupants.

10. The sprinkler system and hook up must include a back flow prevention device which is acceptable to the COUNTY, to protect the overall water system.

11. The SCHWARZERs are to pay for the actual hook up to the existing water system and the back flow prevention device.

12. The SCHWARZERS have paid a $2,000 hook up fee to the COUNTY.

13. Equity requires that William Tomerlin be reimbursed $8,113.07, which is

one-half (1/2) of the costs of installing the water main in front of the SCHWARZER property. Likewise, had the SCHWARZERSs installed the water main in front of their property and had Mr. Tomerlin hooked on to the main, the SCHWARZERs would have been entitled to one-half (1/2) of their installation costs.

14. The COUNTY Fire Chief and Engineer are to inspect within five (5) days of completion all work on the sprinkler system and hook up for compliance with all current Douglas County fire codes. A Certificate of Occupancy must be issued by the Public Works Department upon finding the building in compliance.

15. On November 15, 1985, SCHWARZER posted a $5,000 bond as a condition for staying the Order for Contempt entered on July 11, 1985.

CONCLUSIONS

1. ESTHER SCHWARZER was joined as a

party by Court Order November 7, 1985, because she is the apparent sole owner of the property on which the building in dispute is located.

2. The previous Court Orders requiring the installation and hook up of the sprinkler system within sixty (60) days of entry of the Order are reaffirmed, except that the order to extend the water main to the SCHWARZER property is now moot because Mr. Tomerlin installed the water main in front of the SCHWARZER property.

3. The Court Order dated December 12, 1985, is in effect. This Order requires that should the Defendant's convey or assign their interest in the property in dispute to another party, the Defendants must give actual notice to such party of the contents of the Court Order mandating the installation of the sprinkler system which is to be hooked up and functional. Further, this Court Order bound all assignees, grantees, agents,

licensees and employees of the Defendants to the original Court Order of November 29, 1984, requiring a functional sprinkler system.

4. The Court Order dated April 7, 1986, is still in effect. This Order requires that:

a) the sprinkler system comply with the requirements of National Fire Protection Association Pamphlet 13, and,

b) the sprinkler system be approved by the State Fire Marshall, the East Fork District Fire Marshall, and the Douglas County Public Works Department.

5. The Special Use Permit requires a sprinkler system in the building in question.

6. The "Schedule of Rates, Tolls, Charges, Liens, Deposits, Penalties, Connections, and Disconnections and Rules and Regulations for Service of Property from the Facilities of the: Airport Water System, Ridgeview Water System, Sierra

Shadows Water System, and Mountain View Water System, that was prepared by the Douglas County Public Works Department, Utility Division and which was adopted January 18, 1990, is not applicable to the case at the bar.

IT IS THEREFORE HEREBY ORDERED AS FOLLOWS:

1. The SCHWARZERs are to hook up to the water main in front of their property at 1095 Airport Road, Minden, Nevada, a sprinkler system in the building located at said address. The sprinkler system is to be functional and operational and include a back flow prevention device. The sprinkler system must be hooked up in the presence of the Douglas County Public Works Department Engineer and be operational within sixty(60) days of entry of this Order.

2. The SCHWARZERs are to pay all costs of the sprinkler system hook up and back flow prevention device.

3. The SCHWARZERs are to pay Tomerlin $8,113.07 for one-half (1/2) the cost of the installation of the water main. Payment is due prior to the hook up.

4. Inspections and approvals of the sprinkler system are to be completed by the State Fire Marshall, the East Fork Fire District Marshall, and the Douglas County Public Works Department.

5. Upon all approvals, DOUGLAS COUNTY shall issue a certificate of Occupancy for the building in question.

6. The Court will entertain a motion for reasonable attorneys' fees, if submitted, from DOUGLAS COUNTY.

Dated this 20th day of February, 1990.

/s/ David R. Gamble
District Judge

IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY SCHWARZER,
Appellant,
vs.
DOUGLAS COUNTY, NEVADA, a political subdivision of the State of Nevada,
Respondent.

No. 21352

FILED:
27 Jun 91

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court ordering that appellant comply with respondent's fire sprinkler ordinance and reimburse a neighboring property owner for costs incurred in extending the county water main.

In April 1977, appellant Henry Schwarzer sought a special use permit from the Douglas County Board of Adjustments to construct an industrial building. The Board granted the permit on condition that Schwarzer install a sprinkler system subject to the approval of the Douglas County Fire Chief. Appellant constructed his building without a sprinkler system. The County refused to issued an occupancy permit until the sprinklers were

installed.

In 1983, appellant requested that the Board of Adjustments exempt him from the sprinkler requirement. The Board refused and appellant filed an action in the district court. The court gave appellant sixty days to comply with the sprinkler requirement. Appellant refused to comply. In July 1985, Mr. Schwarzer was found in contempt of court and an Order and Warrant of Commitment was issued. Rather than comply with this order, appellant transferred title to the building to his wife as her sole and separate property. The court then ordered that Mrs. Schwarzer be joined and that her husband continue to be bound by all orders. A trial on the merits was also ordered.

After trial in November 1985, the court found that: "There is a danger of loss of life and property due to occupancy of the defendant's building without the required sprinkler system." The matter was continued to give appellants time to

earlier orders. The court disagreed, finding that the building was subject to both the sprinkler ordinance and the terms of the special use permit. It is from this third ruling of the district court that appellant now appeals.

We will not disturb a trial court's factual finding unless such finding was clearly erroneous or not based on substantial evidence. Stickelman v. Moroni, 97 Nev. 405, 407, 632 P.2d 1159, 1161 (1981). We believe the district court correctly determined that appellant was required to install sprinklers under the Douglas County fire sprinkler ordinance and under the terms of the special use permit. We also believe the court correctly determined that appellant was equitably required to reimburse his neighbor for one-half the cost of extending the water main, particularly where the neighbor's costs were incurred after appellant was held in contempt for not extending the water main himself.

Accordingly, we hereby

ORDER this appeal dismissed.

/s/ Mowbray, C.J.
/s/ Springer J.
/s/ Rose J.
/s/ Steffan J.
/s/ Young J.

Case No. 14399 FILED 19 Oct 90
Dept. No. 1

IN THE NINTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR
THE COUNTY OF DOUGLAS

DOUGLAS COUNTY, NEVADA, a political subdivision of the State of Nevada,
Plaintiff,
vs.
HENRY SCHWARZER and ESTHER SCHWARZER;
Defendants.

ORDER

THE COURT reviewed the document recently served (but not filed), which is attached hereto as Exhibit A. Based upon the comments of counsel contained in that document, including various false statements concerning this Court and the record in this case which would constitute clear violations of NRCP Rule 11 had the document been filed, the undersigned District Judge hereby voluntarily

disqualifies himself in order to avoid the appearance of unfair treatment of the Schwarzers as a result of their attorney's actions. NRS 1.230(3).

IT IS REQUESTED that the Supreme Court assign a visiting Judge to hear any and all further matters that may come before the Court in the above-entitled action.

The hearing previously scheduled for October 22, 1990, at 3:00 p.m. is hereby vacated and shall be reset by the District Judge assigned by the Supreme Court.

DATED this 19 day of October, 1990.

/s/David R. Gamble
DISTRICT JUDGE

THE SUPREME COURT OF THE STATE OF NEVADA

HENRY SCHWARZER,
Appellant,
vs.
DOUGLAS COUNTY, NEVADA,
a political subdivision
of the State of Nevada,
Respondent.

No. 21352

FILED: 16 Jul 91

PETITION FOR REHEARING

Appellant Schwarzer petitions the Court for rehearing or reconsideration of its Order Dismissing Appeal filed on June 27, 1991 in these proceedings.

The appellant, in the face of this court's findings to the contrary, sets out these grounds for reconsideration:

1. This court should reconsider its conclusion that the district court had jurisdiction to order Schwarzer "to pay to William Tomerlin $8,113.07" (or any other amount) because "equitably required" to do so.

2. This court was in error in its failure sua sponte to vacate and set aside the district court's challenged order and

to remand with directions for a new trial where, as here, the trial judge — on his own motion made after judgment and after this appeal had been lodged — disqualified himself pursuant to the provisions of NRS § 1.230 (3) "upon the ground of actual or implied bias" while this appeal was pending.

3. In January and February of 1990 (as is the case today) the Schwarzer Building was in compliance with the applicable Douglas County fire and building code ordinance governing sprinklering.

This petition is filed pursuant to NRAP Rule 40, is made upon all of the pleadings and papers before this court, and upon the supporting brief filed and served herewith.

Dated this 14th day of July, 1991.

/s/George W. Abbott
Nevada Bar No. 2178
1095 Airport Road
P.O. Box 98
Minden, Nevada 89423
(702) 782-2300; 782-2302
Attorney for appellant-petitioner

IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY SCHWARZER,
Appellant,
vs.
DOUGLAS COUNTY, NEVADA, a political subdivision of the State of Nevada,
Respondent.

No. 21352

FILED:
5 Nov 91

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Mowbray C.J.
/s/ Rose J.
/s/ Young J.

Steffen, J., with whom Springer, J., joins in dissenting:

In our rush to do equity, this court overlooked fundamental, black letter law: a court is without jurisdiction to enter judgment either for or against a non-party to an action. See Quine v. Godwin, 646 P.2d 294, 298 (Ariz. App. 1982); 49 C.J.S. Judgments §28. In agreeing with the foregoing "elementary common law principle," the court in Fazzi v. Peters, 440 P.2d 242 (Cal. 1968), noted that

"'[i]t is the general rule that a judgment may not be entered either for or against a person who is not a party to the proceeding, and any judgment which does so is void to that extend.'" Id. at 245 (quoting In re Wren, 308 P.2d 329, 331 (Cal. 1957).

I am unaware of any lawful principle that would support the district court's judgment ordering Schwarzer to pay his neighbor, William Tomerlin, a non-party to the action, the sum of $8,113 (one-half the cost of the water main extension). We were simply wrong in affirming a judgment that by all means is void insofar as it grants relief to a non-party. Of course, the district court could have entered a judgment allowing the respondent Douglas County to surcharge Schwarzer's water usage until his share of the water main extension was paid. The county could then, without court involvement, correspondingly adjust Tomerlin's water charges downward to achieve equity.

Despite the majority's desire, which I share, to reach a simplified end to this litigation in the name of equity, I do not consider the majority's willingness to validate a clear nullity an acceptable option. Although I initially subscribed to the expedient now maintained by the majority when I signed our original order dismissing appeal, I have since concluded that such a resolution, however equitable, may not be countenanced under any legal principle. I therefore conclude that we should grant rehearing and remand the matter to the district court for entry of a lawful judgment.

/s/ Steffen J.

I concur:

/s/ Springer J.

Case No. 14399 (NJDC) FILED 9 Jan 92
Case No. 21352 (On SC appeal)

Dept. No. I.

IN THE NINTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR THE
COUNTY OF DOUGLAS

HENRY SCHWARZER,
Defendant-Appellant,
vs.
DOUGLAS COUNTY, NEVADA,
a political subdivision
of the State of Nevada.
Plaintiff-Respondent /

MOTION TO STAY ENFORCEMENT OF JUDGMENT PENDING APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI; and FOR AN (Ex parte) ORDER SHORTENING TIME FOR HEARING

[28 USCS § 2101 (f); S Ct Rule 44.2; NRCP Rule 62; DCR Rule 17; NJDCR Rule 9]

Henry Schwarzer, the defendant-appellant above-named, by and through his undersigned attorney, George W. Abbott, Esq., presents his application for, and moves this Court to enter, an order staying execution of the judgment rendered by this Court on February 20, 1990 in favor of plaintiff-appellee Douglas

County, Nevada and against defendant-appellant Henry Schwarzer (and his wife Esther Schwarzer, herein collectively "Schwarzer") in the above-entitled cause.

1. It is requested that such stay operate for a reasonable period of time, and in any case for a period of time sufficient to permit processing by movant-judgment debtor Schwarzer of an application to the Supreme Court of the United States for writ of certiorari.

2. It is also requested -- time constraints for filing of an application to the United States Supreme Court considered -- pursuant to DCR Rule 17, and NJDCR Rule 9(c) that the Court issue its order shortening time so as to provide that this matter may be heard on or before the fifth (5th) judicial day following filing by Schwarzer, and timely service upon Douglas County as required for ex parte order requests by DCR Rule 17.

4. This motion is made under the provisions of § 2101 (f), Title 28, United States Code, and is made pursuant to United States Supreme Court Rule 44.2 and related rules. It is made also consistently with the provisions of NRCP Rule 62(d).

5. This motion is made to enable judgment debtor Schwarzer, premises considered, to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, and — pending such activity on the part of Schwarzer — to stay execution or other form of process on the part of "judgment creditor" Douglas County to realize on the subject judgment.[2]

---

[2] While perhaps no more anomalous than other historically puzzling and even bizarre aspects of the 24-year Douglas County-Schwarzer relationship: The trial court specifically awarded (at the insistence of Douglas County's district attorneys) , and the Supreme Court sustained (responsive to a by-then expected sardonic demand in oral argument of the Douglas County appellate

3. Movant Schwarzer recognizes the requirement that the judgment creditor (Douglas County) be given security for payment of the judgment, interest and costs, in the form of a supersedeas bond for stay of execution, or alternatively — in the unusual posture of this case [1] — security equivalent in the form of Schwarzer cash already, and for many months last past, in the hands of Douglas County (f.n. 1) upon a stipulated agreement of the parties.

I. AUTHORITY, PURPOSE

---

[1] Douglas County, at the present time is holding funds aggregating an indicated amount of +/- $10,000: $5,000, plus accruals, from December 5, 1985 representing cash bond deposited pursuant to court order of that date; $2,000 paid nearly two years ago, on February 2, 1990 by Mr.Schwarzer — and received, and receipted for, and accepted, by the Douglas County Department of Public Works — as the Douglas County Fire Code prescribed full amount (or, indeed, excess amount) required for hookup to the 10-inch "Tomerlin" main, and under the fire code clearing the way for hookup by Mr. Schwarzer, with county engineer oversight.

spokesman), a money judgment in favor of a private individual, William Tomerlin, a person not a party to these proceedings. Thus, the conventional term "judgment creditor" if applicable at all, applies not to party plaintiff Douglas County [Schwarzer owes nothing to Douglas County (by trial court adjudication, on account, or otherwise; indeed Douglas County has in its hands cash amounts provably (on the record before the trial court) owing to Mr. Schwarzer], and not to Mr. Tomerlin (whose sworn testimony negatives, indeed precludes, any claim for cash reimbursement of "pipeline payments", since William Tomerlin, patently, made none. If someone, or some entity, did pay $16,000+ for the subject pipeline segment, it was not Mr. Tomerlin.

(We hasten to note that Mr. Tomerlin himself did not — on the trial record, or elsewhere to our knowledge — claim that William Tomerlin had paid any of the $16,000+. At the trial and appellate levels this "Tomerlin payment" was and is a Kolvet-Story-Doyle contrivance and invention, a part of what Schwarzer's trial counsel — in a (for him) uncharacteristically emotional moment — called the district attorneys' continuing "Hang Henry!" campaign.)

It is thus and nevertheless apparent that any stay of execution of the money judgment entered by Judge Gamble would, necessarily and inescapably, have to specifically include William Tomerlin, an individual, a non-party, but a person who is the only named beneficiary of adjudged dollar amounts, carried in the Ninth Judicial District Court's orders from which appeal was taken. And n.b.: the challenged trial court order of February

II. GROUNDS

6. The grounds on which the Schwarzer(s) petition for certiorari or alternative writ is based include these: denial by Douglas County and its prosecutors, as well as by the Ninth Judicial District trial court, of fundamental rights, privileges, and immunities guaranteed to Schwarzer(s) by the Fifth Amendment and by the Fourteenth Amendment to the United States Constitution, as exemplified, inter alia by the actions and determinations, warranting invocation of Constitutional rights as applied at virtually all court levels as "black letter law", summarized in paragraphs set out following:

7. Item: a trial court order

20, 1990 (¶ 3, p.6, lines 26-28) is explicit, unequivocal (emphasis supplied: "3. The SCHWARZERS are to pay Tomerlin $8,113.7 for one-half (1/2) the cost of the installation of the water main. Payment is due prior to the hook up."

awarding money judgment to one William Tomerlin, a person not a party to the trial court proceedings.[3] The "award" to

---

[3]The trial court, effectively, ordered the payment of $8,000+ to Mr. Tomerlin personally "to reimburse William Tomerlin for Henry Schwarzer's share of payment by William Tomerlin of pipeline costs" which assertedly provided benefits to Schwarzer(s). The undisputed evidence before the trial court (supplied under subpoena, and testified to, by witness William Tomerlin himself with accompanying exhibits supplied by Mr. Tomerlin himself) is that William Tomerlin personally did not pay one cent toward the claimed $16,000+ cost of the pipeline segment for which the Court — at vigorous and sustained County/district attorney insistence — assessed one-half the "William Tomerlin out-of--pocket costs." On facts known at trial to the district attorneys of Douglas County and chargeably understood by them — as well as known on the record made by and chargeably understood by the trial court — we have a situation where the trial court ordered Schwarzer(s) to pay (and the argument to the Supreme Court by the Douglas County Chief Deputy District Attorney in support of such payment was persuasive) more than $8000 personally to admittedly non-party Tomerlin, for prov- ably zero-disbursement by Mr. Tomerlin personally, for suspiciously and totally disproportionate benefits-burdens inflicted on Schwarzer(s). Thus, Douglas County orchestrated unentitled payment by Schwarzer(s) to a William Tomerlin who was not a party, but an individual who had himself (by his own testimony and his own

Mr. Tomerlin is properly described (in response to Schwarzer's motion to reconsider denial of rehearing) by two dissenting Nevada Supreme Court Justices:

* * * * *

> " In our rush to do equity, this court overlooked fundamental, black letter law: a court is without jurisdiction to enter judgment either for or against a non-party to an action (citations omitted) ...We (the Nevada Supreme Court justices) were simply wrong in affirming a judgment that by all means is void insofar as it grants relief to a non-party (William Tomerlin)."

* * * * *

8. Item: voluntary withdrawal by the Schwarzer trial judge [under Nevada's "actual or implied bias" statute, NRS 1.230 (3)] a withdrawal only after entry

---

agreed exhibits) shown that the out-of-pocket $16,000+ for the "Tomerlin-Schwarzer pipeline segment" did not come from his (Mr. Tomerlin's_ pocket at all. Douglas County, in its zealous pursuit of the Schwarzers, did indeed mislead the trial court as well as the appellate Supreme Court of Nevada. Douglas County's legal representatives have unrelentingly demand "pay William Tomerlin...or else," infra.

of the disputed trial court judgment, after denial by the trial court of Schwarzer NRCP Rule 52 and 59 motions, and after perfection by Schwarzer of his appeal to the Nevada Supreme Court. [Invoked by Schwarzer: the law and case holdings in the forum state (Nevada), as well as a plethora of multi-state appellate, federal, and federal appellate decisions applying Amendment 5 and Amendment 14 standards to what the United States Supreme Court has charactarized in its case holdings as the mandate of an "impartial decisionmaker" and "rigid due process requirements (of) neutrality in adjudicative proceedings."

9. Item: from the trial record and the representa- tions of Douglas County Counsel (Mr. Story, Transcript 6/11/91) in Supreme Court oral argument: the explanatory revelation for the first time of Douglas County-claimed application of its "zoning ordinances" to justify the

Schwarzer "assessment." [Confirming for the first time, Schwarzer asserts, that his treatment (finally articulated in the oral argument to the Supreme Court) at the hands of the County offends the equal protection, due process, and just compensation protections afforded by Amendments 5 and 14 to the Constitution.]

10. Item: the Constitutional aspects of application of County zoning/fire/building regulations [with accompanying threats of "jail time"; with actual "redtagging" and "KEEP OUT" posting of Schwarzer's means of livlihood; with a continuing refusal by the County to issue an "occupancy" permit for a building actually occupied presently and for some 14 prior years; with a Ninth Judicial District trial court judge (repeatedly urged on by the County's district attorneys to do so) unaccountably, and regrettably, letting stand a finding that "the building embraces more than 13,000

square feet" in the face of the County's own records of irrefutable, ungoable awayable, "black letter", physical, seeable, touchable, tangible, unchallenged and unchalleng- able, evidence before the trial court — prior to Schwarzer taking his appeal— that the subject building "since 1968, has embraced less than 13,000 square feet."] The Schwarzer building does embrace less than 13,000 square feet.

Did then, in 1968.

Did in 1983 (Judge Recanzone).

Did in 1985 (Judge Berkson).

Did in 1989-90 (Judge Gamble).

Does today.[4]

---

[4] If the Douglas County District Attorney did today insist "that the building known as the Judicial and Law Enforcement Center at 1625 Eighth Street, Minden is a fifteen (15)-story building, dark purple in color, topped by a golden dome"; and if (a visiting judge sitting in) the Ninth Judicial District Court did tommorrow make findings of fact, and conclusions of law "that the building known as the Judicial and Law Enforcement Center at 1625 Eighth Street, Minden is a

III.

JUSTIFICATION/NECESSITY FOR STAY

11. The stay of enforcement of the subject judgment, through execution or by

---

fifteen (15)-story building, dark purple in color, topped by a golden dome"; and, if the Supreme Court of the State of Nevada — relying upon the integrity, acuity, and sense of responsibility of the respective proponents and (visiting) trial judge — should conclude that the trial court's determinations "were not clearly erroneous," thus effectively finding and affirming "that the Judicial and Law Enforcement Center at 1625 Eighth Street, Minden is a fifteen (15)-story building, dark purple in color, topped by a golden dome"...then — even with the district attorneys' urgings, even with the trial courts findings and conclusions, even with the affirmation of those findings and conclusions as "not clearly erroneous" by the state's court of last resort — it is a fact, respectfully, that when the next Gardnerville Elementary School class visited 1625 Eighth Street in Minden they would not find there a "fifteen (15)-story building, dark purple in color, topped by a golden dome."

Should the same grade school class chance to visit the Schwarzer Building at 1087-1095 Airport Road Minden today, in 1992, they would find there what they would have found in 1967 — a foundation embracing "less than 13,000 square feet," today overtopped by a (Schwarzer) building of "less than 13,000 square feet."

other process, is necessary because, inter alia:

(a) The public prosecutors of Douglas County have twice previously promised and threatened — and have again so promised and so threatened, effectively, if the Schwarzer-challenged County-orchestrated judgment against the Schwarzers is not complied with "fully, literally, and line and verse" — that:

(i) Septuagenarian Henry Schwarzer (and his wife Esther), unless Douglas County (and its courts) and its Sheriff's Department process servers are restrained by the requested stay, will get "jail time" for claimed past (and present and "continuing") "contempts" of court.

(ii) The public prosecutors of Douglas County, unless restrained by the requested stay, will continue to instruct the Douglas County Public Works Department to withhold issuance of a building permit [to "permit", finally, "occupancy" of a

building continuously occupied in whole or in part (notwith- standing sometime "padlocking" by the District Attorney's office) since 1979.]

(iii) The public prosecutors of Douglas County, unless restrained by the requested stay, will continue to instruct the Douglas County "chief" of the East Fork Fire Protection District to "red tag" or classify as "non-complying" the Schwarzer Building which has been the subject of administrative and court-proceedings attention for more than 24 years.

(iv) The public prosecutors of Douglas County, unless restrained by the requested stay, will again attempt to "padlock", to "red tag" (by prominent "DO NOT ENTER" and "UNSAFE TO OCCUPY" notices over the signature-logo of Douglas County or the Douglas County Sheriff's Depart-ment on "each entrance to the building") the subject industrial-commercial building

owned by defendant-appellant-judgment-debtor Schwarzer and his wife.

(v) Douglas County and the Douglas County District Attorney, unless restrained by the requested stay, will continue to use public funds to claim the right to enforce, and will in fact enforce — by execution, arrest and seizure, by attachment, or by other process — a private debt adjudged to be due personally to one William Tomerlin.

(vi) Douglas County and its officials, as well as its Courts, unless restrained by the requested stay will (as effectively promised in written letter notice by the Douglas County Chief Deputy District Attorney, with District Attorney unqualified approbation) proceed to take all or some of the irreparably damaging actions identified in sub-¶¶ (i)-(iv) of this ¶ 5. They will do so and <u>at the same time</u> <u>will continue to bar sprinkler system hookup</u> of the Schwarzer Building

until payment to Mr. Tomerlin of the adjudged $8,113.07 and accruals, if any.

IV SUPERSEDEAS OR OTHER SECURITY

12. Movant Schwarzer has acknowledged (¶ 2, supra) recognition of the requirement that the appellant give such security bond or other security as may be determined by the court in form and amount sufficient to cover "the judgment remaining unsatisfied, costs, interest, and damages for delay —

> "...unless the judge...fixes a different amount or orders security other than the bond."

Supreme Court Rule 44.2; cf. NRCP Rule 62(d).

13. Movant-judgment debtor Schwarzer is prepared promptly to enter into such stipulation with judgment creditor Douglas County respecting security as will satisfy the reasonable determinations of this Court (see, for reference, footnote 1 supra) identifying Schwarzer funds ($5,000 principal amount in 1985) already, and for

many months last past, in control of the Ninth Judicial District Court, as well as funds paid by Schwarzer pipeline-hookup ($2,000).

V. CONCLUSION: RELIEF SOUGHT

14. This Court, premises considered and on the fore- going motion recitals, is requested by Schwarzer to set within five (5) judicial days of the filing and service pursuant to DCR Rule 17 upon Douglas County of this motion (as evidenced by affidavit of service to be returned and filed herein) a hearing.

15. At such hearing, movant requests that the Court enter its order granting or denying the underlying motion for stay, and defining the conditions and timetable for giving of security, or for acceptable conditions upon Schwarzer stipulation with Douglas County respecting security for stay.

16. Should the Court at such hearing deny the underlying request for stay, then

Schwarzer requests that this Court afford him not less than ten (10) calendar days within which to file evidence with this Court that he has made application to a Justice of the United States Supreme Court for an order staying execution, as contemplated by § 2101(f), Title 28 USCS and Supreme Court Rule 44.2.

Dated the 3rd and 7th days of January, 1992.

HENRY SCHWARZER, Movant-appellant

By /s/

George W. Abbott, Esq., of
George W. Abbott, Chartered
State Bar No. 2178
P.O. Box 98
Minden, Nevada 89423
(702) 782-2302

Attorney for Movant-appellant

POINTS AND AUTHORITIES

This motion is made upon all of the papers and pleadings in this matter, as returned by Order of Remittitur of the Supreme Court of the State of Nevada entered on November 12, 1991.

This motion is also made upon

the provisions of Amendments 5 and 14, Constitution of the United States, as well as upon the following: 28 USCS 2101 (f), and related federal statutory provisions; (US) Supreme Court Rule 44.2 and related rules of that court; (Nevada) DCR Rule 17; and NJDCR Rule 9.

Dated this 7th day of January, 1992 .

/s/ George W. Abbott

Case No. 14399 Filed 27 Jan 92
Dept. No. I

IN THE NINTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR
THE COUNTY OF DOUGLAS

DOUGLAS COUNTY, NEVADA,
Plaintiff- Respondent.
vs.
HENRY SCHWARZER,
Defendant-Appellant.

ORDER GRANTING STAY OF ENFORCEMENT
OF STATE COURT JUDGMENT TO PERMIT
APPLICATION TO THE UNITED STATES
SUPREME COURT FOR A WRIT OF CERTIORARI

On reading defendant-appellant Henry Schwarzer's (defendant) Motion to Stay Enforcement of Judgment Pending Application to the Supreme Court of the United States for Writ of Certiorari filed in these proceedings on January 9, 1992, defendant having requested submission thereof, the papers and pleadings on file disclose that:

1. Acknowledgement of Service by plaintiff-appellee Douglas County (plaintiff), by authorized signature for District Attorney Scott Doyle, Esq., was

duly made on January 9, 1992.

2. Plaintiff Douglas County did not within 10 days after service and at the date of this order 15 days thereafter still has not filed any written opposition.

3. Failure of Douglas County to serve and file its written opposition, pursuant to Nevada District Court Rule, DCR Rule 13 (3), constitutes admission that the motion is meritorious and a consent by Douglas County to granting of the same.

Accordingly,

It is ORDERED that the motion for stay is granted and that execution on and enforcement of the judgment entered on February 20, 1990 in this case be, and the same is hereby stayed until further order of this Court.

It is FURTHER ORDERED that the above-named plaintiff Douglas County, its agents, servants, employees, and

attorneys, are stayed from, and are commanded to desist and refrain from, taking any action or causing or knowingly permitting any third party to take any action to realize upon said judgment through execution or otherwise, pending further order of this Court lifting or modifying the stay herein granted.

It is FURTHER ORDERED that William R. Tomerlin, a private citizen not a party to this litigation, but named as a person to whom defendant Schwarzer is ordered by the subject judgment to pay a monetary award in the principal sum of $8,113, with accruals, is also commanded -- together with his agents, servants, employees, and attorneys -- to desist and refrain from taking any action to realize upon said monetary award through execution or otherwise, pending further order of this Court.

It is FURTHER ORDERED that the sum of $10,590.02, claimed by defendant as

presently existing Schwarzer credit entitlement with Douglas County in a document styled "Schwarzer Computation of Money Credits with Douglas County as of January 15, 1992," and filed in these proceedings on that date, be held in an interest-bearing account by Douglas County as good and sufficient security to protect the rights and interests of plaintiff County in said judgment pending disposition to finality of the proposed application for writ of certiorari, provided, that: either of the parties may hereafter submit for consideration by the Court application for substitution of security in the form of a conventional surety bond, in lieu of the cash amount now held by Douglas County.

It is FURTHER and FINALLY ORDERED that a file-stamped copy of this Order Granting Stay, within one (1) judicial day of its filing, be served personally, or by certified mail, return receipt requested,

upon Douglas County District Attorney Scott W. Doyle, Esq., upon Douglas County Chief Deputy District Attorney Robert W. Story, Esq., and upon William R. Tomerlin.

Dated this 27 day of January, 1992 at the hour of 8:30 o'clock A. M., PST.

/s/ Michael R. Griffin
District Judge, by
Assignment

Case No. 14399 FILED 13 June 90

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF DOUGLAS

DOUGLAS COUNTY, NEVADA, a political subdivision of the State of Nevada,
Plaintiff,
vs.
HENRY SCHWARZER and ESTHER SCHWARZER,
Defendants.

ORDER

On February 20, 1990, an Order was entered in this case after evidentiary hearings were held on February 6 and 7, 1990. In addition to these hearings, the Court reviewed the file, the pleadings, the other papers, the prior Court Orders, and the transcripts of other previous hearings.

On March 6, 1990, the Defendants, HENRY and ESTHER SCHWARZER, filed a Motion to Amend the Findings, Conclusion and Judgment; or in the Alternative, for a New Trial. The Defendants rely on NRCP 52 and 59. Attached to this motion is a survey

47

of the building in dispute. The survey was completed on March 6, 1990, and purports that the building is 12,808 square feet. While the Defendants dispute many of the Court's findings, the focus of the disagreement appears to be on the finding that the building in question contains 13,000 square feet. The Defendants argue that since this finding is wrong all other conclusions that flow from this fact are erroneous. Thus, the Defendants claim the Court Order of February 20, 1990, should be amended or a new trial held.

On March 19, 1990, the Plaintiff, DOUGLAS COUNTY, filed its Opposition to the Defendants' Motion. The County argues that the findings do not need to be modified because the actual square footage of the building in dispute is irrelevant. The size of the building is not at issue due to the Special Use Permit issued on April 7, 1977, that requires sprinklers in

the building regardless of the size of the building.

Next, on March 30, 1990, the Defendants filed their Reply to the Plaintiff's Opposition to the Motion to Amend or New Trial. SCHWARZERs claim that the District Attorney never inspected the building for compliance nor tried to measure the building in question to determine the actual square footage. The Defendants conclude that the building is in compliance with the current exiting Douglas County Code. Additionally, the Defendant seeks a hearing, for the purpose of making a meaningful record.

Subsequently, on April 13, 1990, the Defendants filed their First Supplement to DOUGLAS COUNTY's Reply. SCHWARZERs filed this supplement because they allegedly discovered the County Assessor's measurements of the building dated December 12, 1983, indicating that the building contains 12,536 square feet of

floor space. The Defendants further claim that the District Attorney somehow, either knowingly or negligently, concealed this information. The SCHWARZERs seek to have admitted the Assessor's record and other additional evidence.

Next, the District Attorney filed a Motion to Strike, or in the alternative, a Reply to the Defendants' First Supplement. The Plaintiff argues that a Supplement is not permitted under DCR 13, so the Court should strike the Supplement. Further, DOUGLAS COUNTY avers that it did not hide the size of the building because the size of the building is immaterial. The Special Use Permit requires operating sprinklers in the building and the building does not have sprinklers that function. Thus, the building is not in compliance with Douglas County requirements.

Then, on May 8, 1990, the SCHWARZERs filed their Opposition to the Plaintiff's

Motion to Strike; Countermotion to Set Aside the Plaintiff's Motion to Strike for Want of Rule 11 Compliance. The argument of the Defendants is that the Motion to Strike was signed by Deputy District Attorney Robert Morris, who the Defendant has never heard of or seen. Therefore, the Plaintiff's Motion to Strike should be set aside.

Finally, the SCHWARZERs, on May 23, 1990, filed an Ex Parte Motion to Confirm Filing of Supplement to the Reply to Plaintiff's Opposition to Rule 52 and Rule 59 Motions and to Confirm Filing of Tendered Proposed Exhibits. The Defendants argue that the Court should accept this newly discovered evidence to review the whole picture in the interest of justice.

I.

Three Nevada Rules of Civil Procedure apply to new trials and amending of orders. First, NRCP 52 provides:

a) In all actions tried upon the facts without a jury...the court shall find the facts specially and state separately the conclusions of law thereon and direct the entry of the appropriate judgment...Findings of fact shall not be set aside unless clearly erroneous...(emphasis added).

b) Upon motion of a party made not later than 10 days after service of written notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

Second, NRCP 59 provides:

a) A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: 1) Irregularity in the proceedings of the court...or of any order of the court,...or abuse of discretion by which either party was prevented from having a fair trial;... 4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at trial;...7) Error in law occurring at the trial and objected to by the party making the motion. On motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new

findings and conclusions and direct the entry of a new judgment. (Emphasis added).

b) A motion for a new trial shall be served not later than 10 days after service of written notice of the entry of judgment.

Third, NRCP 61 is the appropriate standard for review for a new trial motion. This rule provides:

No error in either the admission or the exclusion of evidence and no error defect in any ruling or order or in anything done or omitted by the court or by any of the parties is grounds for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceedings must disregard any error defect in the proceeding which does not affect the substantial rights of the parties. (Emphasis added.)

Thus, orders may be set aside if they are clearly erroneous and affect a substantial right of a party.

II.

The Motion for a New Trial is

inappropriate at this time because there was no trial held on February 6 and 7, 1990. The proceedings on those days were mere evidentiary hearings. Pursuant to NRCP 59(b), the Defendant is required to file a motion 10 days after trial. The last trial was held in November of 1985. Clearly more than 10 days have lapsed since trial, so the Motion for New Trial is DENIED.

III.

On the issue of the size of the building in question, both parties had unlimited opportunities to measure the building and to offer evidence of the actual square footage of the building. The Plaintiff apparently did not measure the building because DOUGLAS COUNTY believes that the size of the building is immaterial. The County relies on the Special Use Permit issued April 7, 1977, that requires sprinklers. The County also relies on the fact that on February 3,

1983, the Board of County Commissioners refused to waive this sprinkler requirement. Whether the building is 13,000 square feet, 12,808 square feet, or 12,536 square feet, is not determinative of whether the building is in compliance with DOUGLAS COUNTY requirements. The actual square footage of the Defendants' building is of no consequence.

Further, in their quest for a new trial the Defendants allot much of their pleadings and other papers to the "discovery" of the actual size of the building. The Defendants criticize the Plaintiff for either knowingly or negligently failing to disclose the County Assessor's record of December 12, 1983, on the floor space of the building.

However, the granting of a new trial motion based upon newly discovered evidence is unusual and exceptional. Applications for such relief are looked upon with distrust and disfavor, and must

be granted with caution; and the newly discovered evidence is regarded with suspicion. Bramlette v. Titus, 70 Nev. 305, 312 (1954), citing 66 CJS New Trial § 101.

Since this Assessor's record is a public record and readily available to the Defendants, discovery of this record after the hearing and entry of the Order is not grounds for a new trial, unless the Defendants made a diligent search in the proper office and such record was not discovered before trial. Drespel v. Drespel, 56 Nev 368, 373 (1935). Further, the Defendants' Motion for a New Trial is deficient because the Motion and Affidavit lack any factual explanation of the diligent search made by the Defendants to uncover the Assessor's records. Drespel v. Drespel, 56 Nev 368, 373 (1935). If the Defendants believed this information was important to their case, they had the burden to discover and present the County

Assessor's record. Any consequence that derives from the failure to discover the assessor's records belongs to the Defendants, not the District Attorney.

IV.

Under District Court Rules, a party may file a motion, an opposition, and a reply. DCR 13. Therefore, the SCHWARZERs' Supplemental Reply of April 13, 1990, and Ex Parte Motion to Confirm of May 23, 1990, are not permitted pursuant to District Court Rules. The contents of this motion and attached exhibit are not relevant to the issue of compliance with the Special Use permit and the existing Douglas County requirements, as mentioned in the discussion under Section I. of this Order. Because this reply is not procedurally proper, nor are its contents relevant, the Motion to Strike is GRANTED. This being the case, the Court need not address the SCHWARZERs' arguments in their Opposition to the

Motion to Strike and the Defendants' Countermotion to Set Aside the Plaintiff's Motion to Strike.

V.

Finally, the SCHWARZERs' Ex Parte Motion of May 23, 1990, is also inappropriate under DCR 13 because it is not a motion, opposition, or reply. However, the Motion merely asks for consideration of the Defendants' original Motion to Amend or for a New Trial, so it has been addressed by the Court under Section I. of this Order.

VI.

Even though the Defendants requested a hearing on their Motions for complete record, a hearing is not necessary. NJDCR 5.4. The Court being fully advised, makes the following Order.

IT IS HEREBY ORDERED that the Defendants' Motion to Amend, or in the Alternative, for a New Trial be, and hereby is, DENIED.

IT IS FURTHER ORDERED that the Plaintiff's Motion to Strike be, and hereby is, GRANTED.

Dated this 13 day of June, 1990.

/s/ David R. Gamble
District Judge

Douglas County Code Ordinance No. 491,
as amended April 6, 1989

(h)(1) Except as provided in this section, all buildings or structures having a total building area of five thousand (5,000) square feet or more, and/or all buildings or structures three stories high or in excess of 45 feet in height, whichever is less, shall be provided with automatic fire sprinkler protection.

* * * *

(5) Total building area is defined for the purpose of this section as the total floor area in square feet for all floor levels within the exterior walls or under the horizontal projection of the roof of a building. Each portion of a building separated by one or more four-hour area separation walls with no openings and provided with a 30-inch parapet constructed in accordance with The Building Code may be considered as separate buildings for the purpose of determining total building area.

(Ordinance No. 491; emphasis added.)